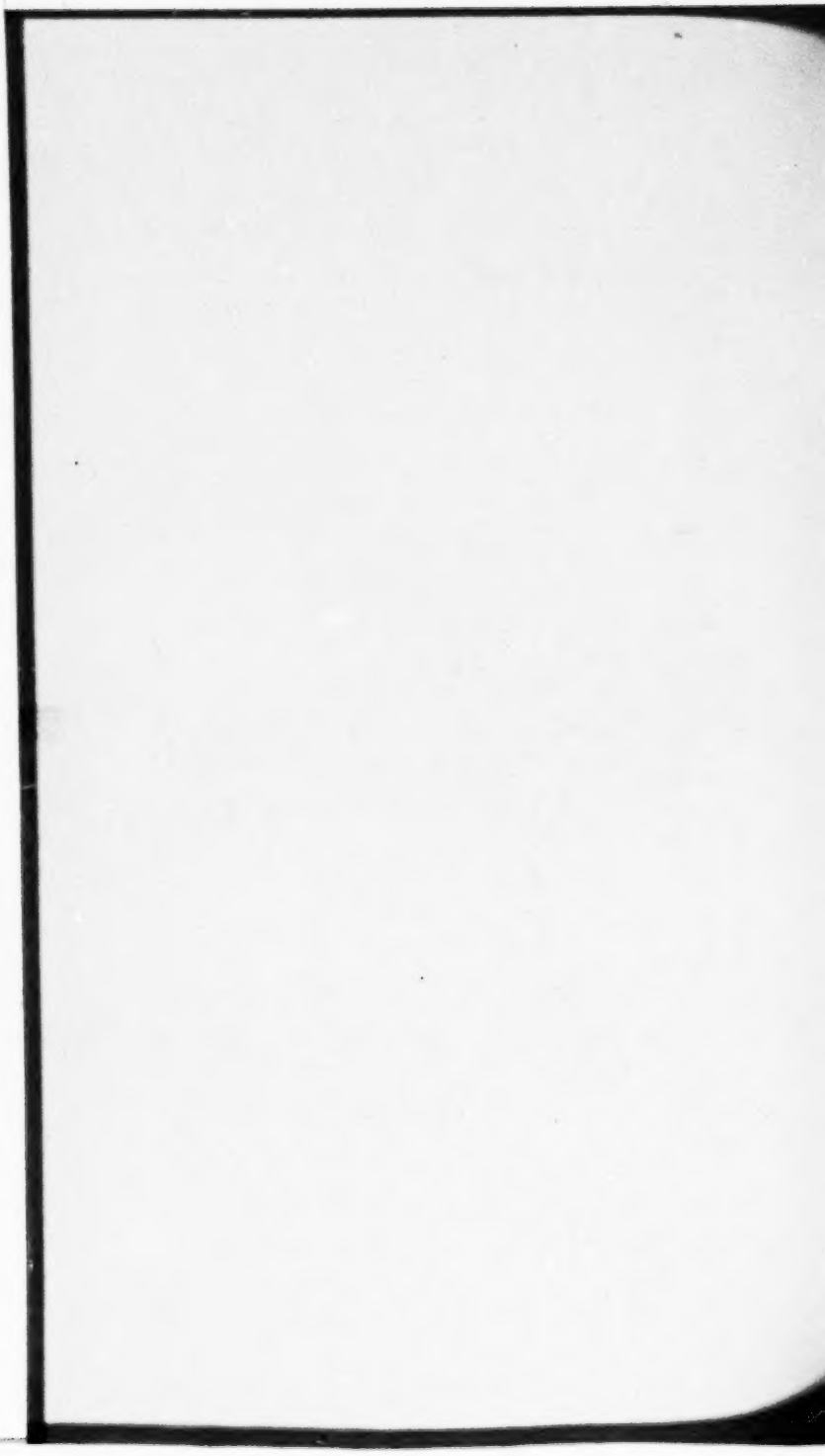
INDEX

CITATIONS



In the Supreme Court of the United States

OCTOBER TERM, 1948

No.

WILLIAM R. MCCOMB, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

HUNT FOODS, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of William R. McComb, Administrator of the Wage and Hour Division, United States Department of Labor, prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Ninth Circuit, entered in the above case on April 14, 1948.

OPINIONS BELOW

The opinion of the district court (R. 21-27) is reported at 74 F.Supp. 182. The majority and dis-

senting opinions of the circuit court of appeals (R. 195-202) are reported at 167 F.2d 905.

JURISDICTION

The judgment of the circuit court of appeals was entered on April 14, 1948 (R. 203). An extension of time within which to file this petition for certiorari was granted on July 10, extending the period for the filing of this petition to September 1, 1948 (R. 204). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925 (now 28 U.S.C. 1254).

QUESTION PRESENTED

Whether respondent's operations on apple peelings and cores purchased from neighboring apple dehydrating plants constitute "the first processing of * * * fresh fruits" within the meaning of Section 7(c) of the Fair Labor Standards Act or within the meaning of the Administrator's regulation promulgated under Section 7(b)(3) of the Act.

STATUTE AND REGULATION INVOLVED

The pertinent provisions of the Fair Labor Standards Act of 1938 (52 Stat. 1060, 29 U.S.C. 201) are as follows:

> SEC. 7. (c) In the case of an employer engaged in the first processing of milk, whey, skimmed milk, or cream into dairy products, or in the ginning and compressing of cotton, or in the processing of cottonseed, or in the processing of sugar beets, sugar beet molasses, sugarcane, or maple sap, into sugar (but

not refined sugar) or into syrup, the provisions of subsection (a) shall not apply to his employees in any place of employment where he is so engaged; and in the case of an employer engaged in the first processing of, or in canning or packing, perishable or seasonal fresh fruits or vegetables, or in the first processing, within the area of production (as defined by the Administrator), of any agricultural or horticultural commodity during seasonal operations, or in handling, slaughtering, or dressing poultry or livestock, the provisions of subsection (a), during a period or periods of not more than fourteen workweeks in the aggregate in any calendar year, shall not apply to his employees in any place of employment where he is so engaged.

SEC. 7. (b) No employer shall be deemed to have violated subsection (a) by employing any employee for a workweek in excess of that specified in such subsection without paying the compensation for overtime employment prescribed therein if such employee is so employed—

* * * * *

(3) for a period or periods of not more than fourteen workweeks in the aggregate in any calendar year in an industry found by the Administrator to be of a seasonal nature,

and if such employee receives compensation for employment in excess of 12 hours in any workday, or for employment in excess of 56 hours in any workweek, as the case may be,

> at a rate not less than one and one-half times the regular rate at which he is employed.

The pertinent provision of the Administrator's determination made pursuant to Section 7(b)(3) is as follows (5 Fed. Reg. 3167):

> The first processing and canning of perishable or seasonal fresh fruits and vegetables is a branch of an industry and of a seasonal nature within the meaning of Section 7(b)(3) of the Fair Labor Standards Act and Part 526 as amended of the Regulations issued thereunder.

STATEMENT

Respondent, Hunt Foods, Inc., is engaged in the production of various food products in the State of California at its manufacturing plants at Hayward, Mountain View, Ryde, Oakdale, and Graton (R. 44). This litigation relates to the Company's activities only at its Graton plant, which was used for the production of apple juice, fermented apple cider, and pomace principally from apple peelings and cores (R. 10, 30).[1]

The production season at the Graton plant normally extends for a period from 15 to 19 weeks,

---

[1] The action was originally commenced against, and judgment was entered in the name of California Conserving Company, Inc. (R. 2, 34). On December 1, 1945, California Conserving Company was merged with Hunt Foods, Inc., which succeeded to all its rights and duties (R. 192). On July 15, 1947, the Circuit Court of Appeals for the Ninth Circuit, on stipulation of the parties, substituted the latter corporation as defendant and appellee (R. 190-191).

beginning in the first week of July and ending in the first week of December (R. 30, 32). During this period, respondent purchased apple peelings, cores, and whole apples of an inferior grade, commonly known as "culls," from neighboring dehydrating establishments (R. 73-74). A small quantity of culls were also purchased from farmers in the surrounding area (R. 74). During the years 1942, 1943, and 1944, the largest part of the raw material used by the Company at its Graton plant consisted of peelings and cores, varying in amount from 72 to 90 percent of the total tonnage of raw materials used; the balance consisted of culls (R. 10).

A small amount of the peelings, cores, and culls are transported to respondent's Graton plant by a conveyor belt running from a neighboring dehydrating plant. The remainder are purchased from other dehydrating plants and farmers (R. 74-75, 181-182). Upon their receipt at the plant, the peelings, cores, and culls are dumped into a pit from which they are carried by a conveyor belt to a grinder. The ground material is thereafter carried by another conveyor to a hopper through which the ground material is dropped onto trays. These trays are then stacked on carts which are run to a press. There, by means of hydraulic lifts, the trays are raised against a rigid surface so that the juice is pressed out. The juice runs over the trays and through openings into an underground tank, from

which it is immediately pumped into fermenting tanks. The apple juice is allowed to ferment approximately three days and after that it is pumped into storage tanks where it remains until needed. (R. 75-80.) In addition to the juice the Company also produces pomace from the residue of the cores, peelings, and culls after the juice has been extracted (R. 81). This residue is carried by means of a conveyor to a grinder or pulverizer, after which it is dried in a rotary drier and then sacked (R. 81). Substantial amounts of both the fermented cider and pomace were shipped in interstate commerce either in their original form or as ingredients of other products (R. 15-16, 17, 19).

During the 15 to 19 weeks which comprised the operational season, respondent did not pay overtime compensation for hours worked after 40 in each week as provided by Section 7(a) of the Act (R. 32, 104, 105, 109-110, 127-128). Respondent alleged that it was exempt from the overtime requirements of Section 7(a) under Sections 7(b)(3) and 7(c) of the Act (R. 8), on the theory that it was engaged in the first processing of perishable or seasonal fresh fruits (R. 56).

Section 7(c) grants an exemption from the overtime provisions of the Act for a period of not more than 14 workweeks in any calendar year to employees in any place of employment where their employer is engaged in "the first processing of * * * perishable or seasonal fresh fruits or vegetables

* * *." Section 7(b)(3) provides a partial overtime exemption for 14 workweeks for employees employed "in an industry found by the Administrator to be of a seasonal nature" if such employee receives time and one-half compensation for employment in excess of 12 hours in any workday or for employment in excess of 56 hours in any workweek. Pursuant to the authority conferred by Section 7(b)(3), the Administrator has determined that "The first processing and canning of perishable or seasonal fresh fruits and vegetables is a branch of an industry and of a seasonal nature within the meaning of Section 7(b)(3) of the Fair Labor Standards Act and Part 526 as amended of the Regulations issued thereunder." 5 F. R. 3167. In so far as pertinent to this case, the regulation promulgated under Section 7(b)(3) adopts the same test as is found under Section 7(c) of the statute.

The Administrator contended that the exemptions did not extend to respondent's operations on the peels and cores because peels and cores are not "fresh fruits" and because in any event the operations performed did not constitute "first processing." The district court (R. 21-27) and majority of the court below (R. 195-198) upheld respondent's contention that the processing of these peels and cores into a nonperishable product constituted a "first processing" of "fresh fruits". Judge Denman, dissenting, urged that to construe the exemption for "first processing of * * * fresh fruits" as

embracing "all the processes to which the fresh fruit is subject till it ceases to be fresh fruit and is in the 'nonperishable' form of a fruit product * * * is to make the adjective 'first' meaningless and to ignore the cardinal rule of construction that words in a statute shall be given effect and not made nugatory" (R. 199).

REASONS FOR GRANTING THE WRIT

The court below has erroneously decided an important question of Federal law which has not yet been, and which should be, settled by this Court. Not only is the decision below contrary to the "normal and spontaneous meaning of the [statutory] language" (*Kirschbaum Co.* v. *Walling*, 316 U. S. 517, 524; see also *Addison* v. *Holly Hill Fruit Products Co.*, 322 U. S. 607, 617-618), but it opens a widespread area of doubt as to the scope of these exemptions and other "processing" exemptions[2] as applied to numerous other industries.

---

[2] The interpretation put on the phrase "first processing of perishable or seasonal fresh fruits and vegetables" may affect the interpretation to be placed upon the following six other provisions of the Act:

1. "The first processing of milk, whey, skimmed milk, or cream into dairy products" (Sec. 7(c)).

2. "The processing of cottonseed" (Sec. 7(c)).

3. "The processing of sugar beets, sugar beet molasses, sugarcane or maple sap, into sugar (but not refined sugar) or into syrup" (Sec. 7 (c)).

4. "The first processing, within the area of production (as defined by the Administrator), of any agricultural or horticultural commodity during seasonal operations" (Sec. 7(c)).

To hold as did the court below that apple peels and cores which are the waste by-products produced by apple dehydrating plants are "fresh fruits" is, we submit, to ignore the "normal and spontaneous meaning of the language"[3] and to construe the exemption in a manner inconsistent with the basic principle of strict construction enunciated by this Court in *Phillips Co.* v. *Walling*, 324 U. S. 490, 493.[4] To go further, as did the court below, and hold that respondent's processing of peels and cores which it purchased from dehydrating plants was the "first" processing of "fresh fruits" is to obliterate the distinction carefully

---

5. "Handling, slaughtering, or dressing poultry or livestock" (Sec. 7(c)). (If the first processing of fresh fruits includes operations upon by-products, such as peelings, it could be strongly argued that the handling or dressing of livestock included the handling or dressing of by-products such as hides.)

6. "Processing . . . the above products or byproducts thereof [aquatic forms of animal and vegetable life]" (Sec. 13(a)(5)).

[3] Compare the following dictionary definition: "Fruit: The edible pulpy mass covering the seeds of various plants and trees, as the orange, apple, pear, berry, etc. Any vegetable product used as food, or otherwise serviceable to man, as grain, cotton, or flax." Funk & Wagnalls New Standard Dictionary of the English Language, 1947 ed.

[4] Although the court below rendered lip service to the *Phillips* doctrine (R. 198), it developed the curious concept that the exemptions are "remedial" as to the employer (R. 196, 198). We do not understand how an exemption which leaves the employer in his pre-statutory condition can be termed "remedial" as to him.

drawn by Congress between "first processing" and other processing and to render redundant and surplusage other specific statutory exemptions.

1. The holding of the court below that a peel or core is a fresh fruit rests on its view that the fruit was still in its "raw and natural state" just as if the fruit "had been merely dimidiated" or halved (R. 196-197). But respondent's operations are not performed upon whole apples (save for the minor proportion of culls)[5] nor upon half apples but upon

---

[5] Under the Administrator's interpretation, respondent's operations, if confined solely to culls, would appear to qualify for the Section 7(c) exemption. However, respondent's operations were not so confined. Indeed, by far the larger part of the product processed by respondent consisted of peelings and cores (ranging from 72 percent to 90 percent during the years 1942, 1943, and 1944) (R. 10). Since respondent's operations were performed on materials consisting of peelings, cores, and culls without segregation, the exemption if inapplicable to the peelings and cores is inapplicable altogether. In cases involving the performance of exempt and nonexempt work, the courts have held the exemption inapplicable to the nonexempt portion of the business. Thus, "when an exempt employer engages in activities different from those exempted, under the statute the employees in the non-exempt department of his business are subject to the Act." *Wabash Radio Corp.* v. *Walling*, 162 F.2d 391, 394 (C.C.A. 6). See also *Collins* v. *Kidd Dairy & Ice Co.*, 132 F.2d 79 (C.C.A. 5); *Walling* v. *Connecticut Co.*, 154 F.2d 552 (C.C.A. 2); *Walling* v. *Goldblatt Bros.*, 152 F.2d 475, 477 (C.C.A. 7); *Davis* v. *Goodman Lumber Co.*, 133 F.2d 52 (C.C.A. 4). And as was pointed out in the *Wabash* decision (p. 394), "where the exempt and non-exempt characteristics of the business are so intermingled as to be inseparable, the exemption is denied entirely" (citing *Guess* v. *Montague*, 140 F.2d 500 (C.C.A. 4)). Since respondent's operations on the peelings, cores, and culls are

peels and cores, the by-products of a dehydrating process. If these by-products or waste portions of a fruit are "fresh fruits," it would follow that banana peels, corn cobs, melon rinds, etc., would be themselves the fresh fruits or vegetables from which they are derived. Under the reasoning of the court below, the exemption, far from being narrowly construed to be applied only to "those plainly and unmistakably within its terms and spirit" (*Phillips Co.* v. *Walling, supra*), would extend, for example, to the making of corn cob pipes as the "first processing" of a "fresh vegetable." By analogy, the handling of hoofs, offal, and other components of livestock would be exempt under Section 7(c) as the "handling, slaughtering, or dressing" of livestock, although the courts have consistently held otherwise. *Sykes* v. *Lochmann,* 156 Kan. 223, 132 P. 2d 620, certiorari denied, 319 U. S. 753; cf. *Walling* v. *Peoples Packing Co.,* 132 F.2d 236 (C.C.A. 10), certiorari denied, 318 U. S. 774; see also *Ormont* v. *Clark,* 164 F. 2d 354 (E.C.A.), certiorari denied, 322 U. S. 854, for a similar holding under the Emergency Price Control Act. We submit that "according to the sense of the thing, as the ordinary man [would understand] * * * ordinary words addressed to him" (*Addison v. Holly Hill Fruit Products Co.,* 322 U. S. 607, 618), cobs are not fresh vegetables,

---

generally not segregated (R. 75-76), respondent's claim to the exemption depends upon whether the operations on the peelings and cores are exempt.

hoofs and offal are not livestock, and cores and peels are not fresh fruits.

2. But even if cores and peels could be considered fresh fruits, respondent's operations constitute the *second,* not the *first* processing. The *first* processing is performed by the dehydrating plants from which respondent purchases the peels and cores.[6] As Judge Denman stated, "The process by which the skins and cores are cut from the apples by the dehydrators is mechanical. * * * The cores and skins so processed become articles of commerce. As such, they are purchased by appellee from the dehydrators." (R. 200.) Plainly the coring and peeling of whole apples is a "first processing." If the cores and peels are still considered part of the fresh fruit, the operations performed upon them in another plant, for another business, by another employer is a *subsequent* processing. The result reached by the court below is that the dehydrating plant and the respondent performing separate processes at different times in connection with the same apples are both "first" processors of the apples, a result which is untenable if the

---

[6] In this respect this case is to be distinguished from *McComb* v. *C. H. Musselman Co.*, 167 F.2d 918 (C.C.A. 3), decided *per curiam* on the basis of the instant case. In the *Musselman* case whole apples were cored and peeled, and the cores and peels were then processed into pomace in the same plant as part of a continuous operation, and not as in the instant case sold as a by-product to an independent processor in a separate establishment.

word "first" is to be given any meaning. See *Ex parte Public National Bank of New York*, 278 U. S. 101, 104.

The Administrator's interpretation avoids this untenable result by construing "first processing" as the first change in the form of the raw materials. Interpretative Bulletin No. 14 (1939), paragraph 15, 1941 W. H. Man. 320. The Administrator has not rigidly limited "first processing" to the first act that changes the natural form of the commodity if the subsequent acts are performed as a part of a continuous process or series of operations beginning with the whole fruit and continuing until either a break occurs in the operations or the product is rendered nonperishable. 1944-45 W. H. Man. 601. In the instant case respondent's operations on the peelings and cores were not part of the first processing of the apples, because a definite break occurred in the processing when the materials moved from the dehydrators' processing plants to respondent. The Administrator's interpretation thus avoids the difficulty of ascribing the "first processing" of the same fruit to two different processing plants.

That Congress meant to distinguish "first processing" from "processing" is shown by the careful use of the one term in certain portions of the statute and of the other term in other sections. See note 2, *supra*. Yet the decision below in effect reads the word "first" out of the exemption by permitting

all processings of a perishable commodity to be termed "first" processing. Moreover, the decision reads into the Act an exemption for processing the component parts or by-products of fresh fruits, despite the fact that when Congress intended to exempt the "first processing" of a part or of a by-product of an agricultural commodity it said so expressly. Thus, skimmed milk is a part of milk just as a core or peel is a part of an apple, but Congress in Section 7(c) expressly exempted *both* the first processing of milk and the first processing of skimmed milk. Obviously if the term "first processing of milk" applied to the first processing of the components of milk (as the reasoning of the court below implies), the reference to skimmed milk would be redundant. Other evidence that when Congress intended to exempt the processing of by-products it did so expressly is to be found in Section 13(a)(5), which exempts not only those processing fish and other aquatic forms of animal or vegetable life but also those processing "the byproducts thereof." The failure of Congress expressly to exempt the processing of component parts or by-products of fresh fruits is thus sharply contrasted with the express exemption granted in analogous situations. Congress in this Act "dealt with exemptions in detail and with particularity * * *. Exemptions made in such detail preclude their enlargement by implication." *Addison* v. *Holly Hill Fruit Products Co.*, 322 U. S. 607, 617.

In addition to reading the word "first" out of the "first processing" exemption and reading operations on by-products and component parts of fresh fruits into it, the effect of the decision below is to reduce several apparently significant terms in the exemption to the level of mere surplusage. The decision rests on the theory that "so long as the fresh fruit, in whole or in part, has not been converted into a non-perishable form" all processing operations are "first processing" (R. 198). As noted in Judge Denman's dissent, not only the "first processing" but also the canning and packing of fresh fruits are specifically exempted under Section 7(c). Yet canning and packing are necessary to convert fresh fruit into a non-perishable product. Under the decision below, canning and packing would be included as "first processing", and the statutory phrase "first processing of, *or* in canning *or* packing" would be rephrased by judicial interpretation to read "first processing *including* canning and packing."

The decision below thus broadens the concept of "fresh fruits" to include the inedible by-products or components of fruits, and construes the term "first processing" in a manner inconsistent with the plain meaning of the word "first" and with the pattern of exemption carefully detailed by Congress. The decision is contrary to the consistent interpretation of the Administrator, whose views as to the scope of Section 7(c) are entitled

to "great weight" (*United States* v. *American Trucking Ass'ns,* 310 U. S. 534, 549; see also *Skidmore* v. *Swift & Co.,* 323 U. S. 134, 139-140), and whose construction of his own regulation under Section 7(b)(3) is of "controlling weight unless it is plainly erroneous or inconsistent with the regulation" (*Bowles* v. *Seminole Rock & Sand Co.,* 325 U. S. 410, 414; see also *Armstrong Co.* v. *Walling,* 161 F.2d 515, 517 (C. C. A. 1)).[7]

3. The effect of the decision below is not limited to the processing of apple peelings and cores into pomace. As noted above (see footnote 2), the decision will affect the interpretation of several other exemptions in addition to the exemption for the first processing of fresh fruits and vegetables. Even if it applied only to the fruit and vegetable exemption, the decision would seem to affect the application of the Act as applied to establishments engaged in such activities as the manufacture of fertilizer, feed, oils, pectin, candied peel, and citric acid, all of which are produced from fruit and vegetable peels and cores, the processing of shelled corn or rice into cereals, the processing of thrashed grain into malt, the processing of shelled nuts, the making of dried eggs, etc. The possible implications of the decision below are thus by no means limited to the manufacture of pomace

---

[7] The Administrator's interpretations are set forth at paragraph 19 of Interpretative Bulletin No. 14 (1939), 1941 W. H. Man. 321-322, and at 5 Wage Hour Rept. 1002. See p. 13, *supra.*

from apple peels but reach into a wide range of industrial operations upon by-products of agricultural commodities.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be granted.

PHILIP B. PERLMAN,
Solicitor General.

WILLIAM S. TYSON,
Solicitor of Labor.

AUGUST 1948.

☆ U. S. GOVERNMENT PRINTING OFFICE, 1948 J803729/94